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No. 95-1353

In the Supreme Court of the United States

OCTOBER TERM, 1995

FORT SUMTER TOURS, INC., PETITIONER

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly accorded deference to the determination of the National Park Service (NPS) that the National Park System Concessions Policy Act (CPA), 16 U.S.C. 20 *et seq.*, authorizes it to include in concession contracts a provision authorizing NPS to adjust franchise fees.

2. Whether the court of appeals correctly rejected petitioner's contention that the CPA forbids NPS from adjusting franchise fees without the agreement of the concessioner.

3. Whether the contention of amicus curiae that the "Concessions Guidelines" manual produced by NPS must be promulgated in accordance with "notice and comment" procedures is properly before this Court.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	19
Appendix A	1a
Appendix B	18a

TABLE OF AUTHORITIES

Cases:

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	8
Commonwealth Edison Co. v. *United States Dep't of Energy*, 877 F.2d 1042 (D.C. Cir. 1989)	10
Lake Mohave Boat Owners Ass'n v. *National Park Serv.*, 78 F.3d 1360 (9th Cir. 1995)	6, 9
Martin v. *OSHRC*, 499 U.S. 144 (1991)	9, 10
National Fuel Gas Supply Corp. v. *FERC*, 811 F.2d 1563 (D.C. Cir.), cert. denied, 484 U.S. 869 (1987)	12, 13
Reno v. *Koray*, 115 S. Ct. 2021 (1995)	11
Transohio Sav. Bank v. *Director, OTS*, 967 F.2d 598 (D.C. Cir. 1992)	12
United States v. *Bethlehem Steel Corp.*, 315 U.S. 289 (1942)	15, 16

Statutes and regulations:

Act of June 30, 1966, Pub. L. No. 89-480, 80 Stat. 232	15
Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:	
5 U.S.C. 553(a)(2)	18
5 U.S.C. 553(b)(3)(A)	18
National Park System Concessions Policy Act, 16 U.S.C. 20 *et seq.*	2
16 U.S.C. 20a	2
16 U.S.C. 20b(a)	2

Statutes and regulations—Continued: Page

16 U.S.C. 20b(b) 2, 15
16 U.S.C. 20b(d) 3, 10, 15
National Park System Concessions Policy Act, Pub. L. No. 89-249, 79 Stat. 969 (1965)..... 2
Renegotiation Act of 1951, 50 U.S.C. App. 1211-1233 (1964) (repealed 1978) 14
§ 101, 50 U.S.C. App. 1211 (1964) 14
36 C.F.R. Pt. 51 3

Miscellaneous:

Concessions Policy of the National Park Service: Hearings Before the Subcomm. on Public Lands, National Parks and Forests of the Senate Comm. on Energy and Natural Resources, 101st Cong., 2d Sess. (1990) 17
41 Fed. Reg. (1976):
p. 28,809 ..... 4, 10
p. 28,812 ..... 4, 12
p. 32,982 ..... 4, 10
42 Fed. Reg. (1977):
p. 63,480 10
pp. 63,480-63,481 4
46 Fed. Reg. (1981):
p. 14,460 10
pp. 14,460-14,461 4
p. 14,467 ..... 4, 5
50 Fed. Reg. (1985):
p. 31,926 6
p. 31,927 6
51 Fed. Reg. 47,314 (1986) 5, 6, 18
58 Fed. Reg. (1993):
p. 3140 ..... 5, 10
p. 3142 5
pp. 3151-3153 5
Park Concession Policy: Hearings Before the Subcomm. on National Parks of the House Comm. on Interior and Insular Affairs, 88th Cong., 2d Sess. (1964) 3, 17

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 66 F.3d 1324. The opinion and order of the district court (Pet. App. 23a-39a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1995. A petition for rehearing was denied on November 27, 1995. Pet. App. 22a. The petition for a writ of certiorari was filed on February 23, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Nearly all goods and services offered to the public within the national parks are provided by private-sector concessioners, pursuant to contracts with the National Park Service (NPS). In 1965, Congress enacted the National Park System Concessions Policy Act (CPA), Pub. L. No. 89-249, 79 Stat. 969 (1965), codified at 16 U.S.C. 20 *et seq.*, to provide statutory authorization and standards to govern concession contracts. The Act provides that

> the Secretary of the Interior shall take such action as may be appropriate to encourage and enable private persons and corporations (hereinafter referred to as "concessioners") to provide and operate facilities and services which he deems desirable for the accommodation of visitors in areas administered by the National Park Service.

16 U.S.C. 20a.

Within this broad grant of discretion, the Act also provides standards governing several aspects of the contractual relationship between NPS and a concessioner. For instance, the Secretary may include in concession contracts terms necessary to assure the protection of the concessioner's investment in structures, improvements, and other property. 16 U.S.C. 20b(a). The Secretary also must exercise his authority in a manner consistent with a reasonable opportunity for the concessioner to realize a profit. 16 U.S.C. 20b(b).

The Act also sets the groundwork for establishment and periodic adjustment of "franchise fees." Such fees, "however stated, shall be determined upon consideration of the probable value to the concessioner of the privileges granted by the particular

contract or permit involved." 16 U.S.C. 20b(d). That value is "the opportunity for net profit in relation to both gross receipts and capital invested." *Ibid.* In determining the appropriate franchise fee, the Act requires that "[c]onsideration of revenue to the United States shall be subordinate to the objectives of protecting and preserving the areas and of providing adequate and appropriate services for visitors at reasonable rates." *Ibid.* Finally, the Act directs that "[a]ppropriate provisions shall be made for reconsideration of franchise fees at least every five years unless the contract is for a lesser period of time." *Ibid.*

2. NPS effectuates this statutory policy principally by means of the contracts into which it enters with concessioners.[1] Prior to enactment of the CPA, NPS used a contract clause that called for franchise fees to be reconsidered every five years but provided no mechanism for resolution of disputes between NPS and the concessioner. See *Park Concession Policy: Hearings Before the Subcomm. on National Parks of the House Comm. on Interior and Insular Affairs*, 88th Cong., 2d Sess. 39, 84 (1964) (*Park Concession Hearings*).

In 1975, the Comptroller General of the United States issued a report to Congress on NPS concessions management. The report noted that, while NPS contracts contained a provision for reconsidering franchise fees every five years, NPS did not

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[1] Although NPS has promulgated formal regulations addressing some aspects of the concessions program, those regulations do not deal with any issues regarding the reconsideration and adjustment of franchise fees. See generally 36 C.F.R. Pt. 51.

have an effective contract provision for resolving disputes over the appropriate franchise fees. See App., *infra*, 2a, 11a (discussing 1975 report). Among the Comptroller General's recommendations was a suggestion that NPS revise the standard concession contract to provide a means to resolve such disputes. *Id.* at 2a.

On July 13, 1976, NPS published a notice in the *Federal Register*, seeking comments on proposed changes in its standard concession contract and noting that the existing contract language "ha[d] not been significantly modified or revised since the enactment of [the CPA]." 41 Fed. Reg. 28,809. Under the proposed standard contract, if the parties could not agree on the appropriate franchise fee during the reconsideration period, the concessioner would be required to submit a written statement to the Secretary, who would then issue a written determination as to the appropriate franchise fee, which "shall be final and conclusive upon the parties hereto." *Id.* at 28,812.

After a series of further comment periods, see 41 Fed. Reg. 32,982 (1976); 42 Fed. Reg. 63,480-63,481 (1977), NPS modified the standard concession contract to read substantially as it does today. The modified contract language was adopted on November 11, 1978, and continued in use through the execution of the latest contract between petitioner and NPS on June 13, 1986. See 46 Fed. Reg. 14,460-14,461 (1981) (discussing development of the standard contract).

Section 9(e) of the standard contract (formerly section 9(d)) provides that the amount and character of the franchise fees may be reconsidered "at the instance of either party" within 60 days after the end of each five-year period. See 46 Fed. Reg. 14,467

(1981). If the parties cannot agree on the appropriate franchise fees, the concessioner must reduce its position to writing and submit it to the Secretary "for a determination of appropriate fees consistent with the fair value of any assigned Government Improvements and the probable value to the Concessioner of the privileges granted by this contract based upon a reasonable opportunity for profit in relation to both gross receipts and capital invested." *Ibid.*

Section 9(e) also provides a dispute resolution mechanism: "If desired by the Concessioner an advisory arbitration panel will be established (one member to be selected by the Secretary, one by the Concessioner, and the third by agreement of the original two) for the purpose of recommending to the Secretary appropriate franchise fees." 46 Fed. Reg. 14,467 (1981). The panel's recommendations are merely advisory; "[t]he written determination of the Secretary as to franchise fees shall be final and conclusive upon the parties hereto." *Ibid.*[2]

In addition to promulgating the standard concession contract, NPS has established a methodology for determining appropriate franchise fees. That methodology is set forth in chapter 24 of the "Concessions Guidelines," the guide used by NPS employees in administering concessions and commonly referred to as "NPS-48." 51 Fed. Reg. 47,314 (1986). NPS-48 does not change any of the contract terms

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[2] NPS altered the standard contract in 1993, see 58 Fed. Reg. 3140, after NPS and petitioner had entered into the contract at issue here. While the advisory arbitration provision of section 9(e) has been amended, the language making the Secretary's determination "final and conclusive" remains the same. See *id.* at 3142, 3151-3153.

that have been constant for all concession contracts since 1978. Rather, it is used to guide agency personnel in carrying out the Secretary's responsibilities under the contract and the Act. See *Lake Mohave Boat Owners Ass'n* v. *National Park Serv.*, 78 F.3d 1360, 1368-1369 (9th Cir. 1995).

Prior to 1985, NPS determined the appropriate franchise fee by analyzing financial statements submitted by the concessioner and determining a minimum fee, adjusted to take into account economic considerations involved with the operation. See 50 Fed. Reg. 31,926, 31,927 (1985). In 1985, however, NPS announced an amendment to the standard. *Ibid.* Under the amended policy, NPS determines the concessioner's annual gross receipts and adjusted net income, and arrives at both a minimum and a maximum fee. The final franchise fee is set between the minimum and the maximum, "based on the concessioner's profitability history in comparison with reported industry statistics." *Id.* at 31,927. That methodology was formally adopted December 31, 1986, and later incorporated into NPS-48. 51 Fed. Reg. 47,314 (1986).

3. Since 1961, petitioner has provided tour boat services and sold souvenirs and refreshments to visitors to Fort Sumter National Monument, a unit of the National Park System, under a series of concession contracts. Pet. App. 2a-3a. Its current concession contract covers the period of June 13, 1986, to December 31, 2000. *Id.* at 3a.

Section 9(a) of the contract established an initial franchise fee of 4.25% of petitioner's annual gross receipts. Section 9(e) authorizes reconsideration of the franchise fee at the end of each five-year period of the contract at the request of either party. Pet. App.

3a. As with the standard concession contract discussed above, section 9(e) of petitioner's contract also authorizes the Secretary to make a "final and conclusive" decision regarding the appropriate franchise fee, subject to advisory arbitration at petitioner's request. *Id.* at 10a-11a.

On June 20, 1991, NPS's Southeast Regional Director notified petitioner that NPS was "considering renegotiating" petitioner's franchise fee. Pet. App. 3a. NPS thereafter prepared a "Franchise Fee Analysis" that concluded that a 12% franchise fee was appropriate for the five-year period of the contract beginning June 13, 1991. *Ibid.* NPS also informed petitioner that it was willing to meet to discuss this determination. *Ibid.* Petitioner declined a second invitation to discuss the fee, as well as a subsequent request that it put its objections in writing. *Ibid.*

Petitioner instead brought this suit on April 21, 1993, seeking a declaratory judgment of its rights and obligations under both the CPA and its contract with NPS. Pet. App. 3a. Subsequently, NPS advised petitioner in June 1993 that, because petitioner had refused to negotiate or to use the contractual advisory arbitration provisions, NPS had completed its review of the record and determined that a fee of 12% was appropriate. *Id.* at 3a-4a.

The district court sustained the Secretary's decision, Pet. App. 23a-39a, and the court of appeals affirmed, *id.* at 1a-21a. The court of appeals first rejected petitioner's argument that the CPA does not grant NPS authority to consider profits when determining franchise fees, noting that "the CPA itself quite explicitly permits the calculation of a franchise fee in relation to the profits that can be expected by a concessioner." *Id.* at 7a. The court

next rejected petitioner's argument that the CPA does not allow NPS to adjust franchise fees without the concessioner's agreement. The court held that the statutory language mandating "reconsideration" of fees does not resolve whether unilateral adjustment of fees is permitted. *Id.* at 8a. The court then held that NPS's interpretation of the Act as providing for both the reconsideration and adjustment of franchise fees "is a completely logical one, and should be upheld." *Id.* at 9a. "In fact," the court concluded, "NPS's interpretation is persuasive; a statutory provision calling for reconsideration of fees would be rendered meaningless if it did not include authority for the adjustment of fees as well." *Ibid.*

Finally, the court of appeals held that the contract provision providing for the fee adjustment is an "appropriate provision" for reconsideration of fees within the meaning of the Act, Pet. App. 10a-12a, and that the method used by NPS to calculate the franchise fee is reasonable, *id.* at 14a-21a.

ARGUMENT

The court of appeals correctly rejected petitioner's challenge to the Secretary's decision to adjust the franchise fee applicable to petitioner's concession contract. That decision is consistent with the rulings of this Court and is not in conflict with any decision of another court of appeals. Further review is not warranted.

1. Petitioner contends that the court of appeals erred in according deference to NPS's interpretation of the CPA under the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Petitioner raised two separate arguments in the court of appeals con-

cerning NPS's statutory authority, contending that: (1) the CPA does not allow NPS to increase franchise fees unilaterally; and (2) the CPA does not grant NPS authority to limit concessioner profits. With respect to the former contention, the court of appeals did accord deference to the Secretary's interpretation that the CPA allows for a unilateral adjustment of franchise fees. See Pet. App. 8a-9a. The court of appeals resolved the latter contention, however, on the basis of the plain language of the Act, without reference to *Chevron* deference. See *id.* at 5a-7a.

a. Petitioner argues that deference to NPS's policy allowing unilateral increases in franchise fees is not warranted for three reasons. Each objection is groundless.

i. Petitioner first points out that NPS-48 is an informal guidance document that was not published for notice and comment. Because informal policies are not entitled to the full measure of deference afforded formal rules that go through notice and comment, petitioner contends, the court of appeals erred in according *Chevron* deference to NPS's interpretation.

Petitioner is correct that NPS-48 is a general statement of internal policy that is not subject to the notice-and-comment procedures of the Administrative Procedure Act. See *Lake Mohave Boat Owners Ass'n*, 78 F.3d at 1368. And informal agency policies, while entitled to some weight on judicial review, may receive a lower degree of deference. See *Martin* v. *OSHRC*, 499 U.S. 144, 157 (1991). Those considerations, however, do not help petitioner, for the policy at issue here appears not just in NPS-48 but also in standard contract terms that have been published

repeatedly in the *Federal Register* for notice and comment.

The standard contract language adopted in 1978—which appears in the specific contract at issue here—explicitly provides that the Secretary may impose an adjustment in the franchise fee, and that the Secretary's decision is "final and conclusive." The Secretary published that language in 1976 for notice and comment, 41 Fed. Reg. 28,809, and twice extended the deadline for receipt of comments before adopting the language, 41 Fed. Reg. 32,982 (1976); 42 Fed. Reg. 63,480 (1977). The Secretary again published the entire contract in the *Federal Register* in 1981. 46 Fed. Reg. 14,460. Moreover, the most recent amendments to the standard concession contract also were adopted after notice and comment. See 58 Fed. Reg. 3140 (1993).

In addition, NPS included the provision authorizing the adjustment of fees in accordance with the explicit direction from Congress to include "[a]ppropriate provisions" in its concession contracts "for reconsideration of franchise fees at least every five years." 16 U.S.C. 20b(d). Because the Secretary's interpretation of the Act in the standard contract provisions "assumes a form expressly provided for by Congress," it is "as much an exercise of delegated lawmaking powers" as the Secretary's promulgation of formal regulations. *Martin* v. *OSHRC*, 499 U.S. at 157; see also *Commonwealth Edison Co.* v. *United States Dep't of Energy*, 877 F.2d 1042, 1045 (D.C. Cir. 1989) (holding that deference is appropriate for standard contract terms published for notice and comment). The court of appeals therefore correctly held that *Chevron* deference is appropriate.

Even if NPS's interpretation appeared only in the informal setting of NPS-48, petitioner's argument would fail. Even informal guidelines are entitled to "some deference." *Reno* v. *Koray*, 115 S. Ct. 2021, 2027 (1995). In the case at bar, the court of appeals held that NPS's interpretation of the Act is not merely "logical" but indeed "persuasive." Pet. App. 9a.

ii. Petitioner next contends (Pet. 15) that deference is inappropriate because NPS's decision to authorize unilateral fee increases represented an "unexplained swerve from forty years of practice." Central to petitioner's contention is the assertion (Pet. 6, 11 & n.2, 13) that NPS first announced its position in a 1987 amendment to the "Concessions Guidelines" in NPS-48—after petitioner signed its latest concession contract. In fact, NPS's interpretation was adopted long before the 1987 amendment to NPS-48. Since 1978, the Standard Concession Contract developed by NPS has contained explicit language giving NPS the authority to adjust franchise fees unilaterally.

In addition, petitioner mistakenly interprets the earlier NPS contractual provision (which did not provide unilateral authority to adjust franchise fees) as an interpretation of the Act as not permitting such an adjustment.[3] At no point did NPS interpret the CPA as precluding a unilateral adjustment in franchise fees. Rather, NPS has merely acknowledged that previous *contractual* provisions provided for

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[3] Amicus National Park Hospitality Association makes the same mistake, asserting (at 9) that "NPS-48 announced that the NPS was abandoning its previous *prohibition* against the unilateral increase of franchise fees." (Emphasis added.)

reconsideration without authorizing NPS to adjust fees when the concessioner does not agree.[4] Indeed, in the very first amendment to the standard contract following the enactment of the CPA, NPS adopted language allowing the Secretary to adjust franchise fees and making the Secretary's determination final and conclusive. See 41 Fed. Reg. 28,812 (1976).[5]

iii. Equally without merit is petitioner's contention (Pet. 17) that NPS's interpretation is not worthy of deference because it is "self-serving." The two cases upon which petitioner relies suggest that deference may not be appropriate for agency interpretations that retroactively affect existing contracts to which the agency is a party. See *Transohio Sav. Bank* v. *Director, OTS*, 967 F.2d 598, 614 (D.C. Cir. 1992); *National Fuel Gas Supply Corp.* v. *FERC*, 811 F.2d 1563, 1571 (D.C. Cir.), cert. denied, 484 U.S. 869 (1987). In such cases, concern may arise because "deference might lead a court to endorse self-serving views that an agency might offer *in a post hoc*

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[4] Contrary to petitioner's assertion (Pet. 12), NPS-48 did not acknowledge a change in agency policy in 1987. Rather, the guideline merely acknowledged that "[t]he old standard contract language requires that any decision to change a franchise fee during a reconsideration period must be mutually agreed to by both parties. That is, if either party does not agree, no change can be effected in the franchise fee." See App., *infra*, 19a.

[5] Moreover, that amendment followed shortly after the Comptroller General submitted a report to Congress criticizing the lack of a dispute-resolution mechanism and recommending an amendment to the standard concession contract. See App., *infra*, 2a. A subsequent Comptroller General report noted that the amended standard contract appeared adequate to address its concerns. *Id.* at 3a.

reinterpretation of its contract." *National Fuel*, 811 F.2d at 1571 (emphasis added).

In the case at bar, by contrast, NPS's interpretation of the statute as authorizing the Secretary to adjust franchise fees is not a post-hoc reinterpretation of any concession contract. The 1978 decision to change the terms of the standard concession contract did not alter any existing contracts; it merely provided that *future* contracts would contain the amended language. As with all such contracts, petitioner's contract with NPS explicitly provided that the Secretary's decision as to the appropriate franchise fee would be "final and conclusive." Thus, petitioner's repeated assertions (Pet. 9, 10, 18, 20) that NPS has sought to "rewrite" essential contract terms and upset settled expectations are unfounded.

b. As explained above, the authority to order an adjustment in franchise fees was published for notice and comment and has existed continuously in the standard contract since 1978, independent of NPS-48, but NPS-48 *is* relevant to a separate argument made by petitioner in the court of appeals. Petitioner argued below that the methodology used in NPS-48 to calculate franchise fees is an attempt to "limit" concessioner profits, and that the CPA does not authorize NPS to adjust fees in order to limit profits. The methodology for determining fees was amended in late 1986 and incorporated into NPS-48 in 1987.

To the extent petitioner argues that the court of appeals erred in according *Chevron* deference to the methodology used to calculate franchise fees, it misreads the court of appeals' opinion. In rejecting petitioner's argument that NPS lacks statutory authority to "limit" concessioner profits, the court of appeals did not defer to NPS-48. Rather, the court

held that the express language of the Act "permits the calculation of a franchise fee in relation to the profits that can be expected by a concessioner." Pet. App. 7a.

2. The matter of *Chevron* deference to one side, petitioner contends (Pet. 18-20) that the court of appeals erred in holding both that the CPA does not prohibit NPS from adjusting franchise fees in order to "limit" profits and that the CPA allows NPS to adjust fees unilaterally.

a. In arguing that the CPA does not allow NPS to "limit" profits, petitioner relies primarily on an entirely separate statute, the Renegotiation Act of 1951, 50 U.S.C. App. 1211-1233 (1964) (repealed 1978). Petitioner argues (Pet. 18-19) that the CPA should be read *in pari materia* with the Renegotiation Act because the latter Act was amended by the same Congress that enacted the CPA. Because Congress declined to extend the provisions of the Renegotiation Act to NPS, petitioner contends, the CPA should not be read to allow NPS to adjust franchise fees in a way that limits concessioner profits.

Petitioner's reliance on the Renegotiation Act is misplaced. That Act did not apply to NPS for one simple reason: it was aimed at defense contracts. See Renegotiation Act of 1951, § 101, 50 U.S.C. App. 1211 (1964) (declaring that "sound execution of the national defense program requires the elimination of excessive profits from contracts made with the United States"). Moreover, petitioner's suggestion (Pet. 19) that Congress could have extended the Renegotiation Act to cover NPS when it "amended" the Act in 1966 is dubious. Far from substantively amending the Renegotiation Act in 1966, Congress merely extended

its expiration date. See Act of June 30, 1966, Pub. L. No. 89-480, 80 Stat. 232.

Nor does the language of the CPA itself support petitioner's contention. Petitioner points out (Pet. 19-20) that the CPA provides concessioners a "reasonable opportunity * * * to realize a profit," see 16 U.S.C. 20b(b), but never explains how NPS's policy violates that principle. As the court of appeals recognized (Pet. App. 7a), the CPA expressly provides for the consideration of concessioner profits in setting franchise fees: it requires that franchise fees "shall be determined upon consideration of the probable value to the concessioner of the privileges granted," and then defines that value as "the opportunity for net profit in relation to both gross receipts and capital invested." 16 U.S.C. 20b(d). Since the value of the concession privileges is related to the profit potential of the enterprise, NPS reasonably takes into account the concessioner's profitability history in comparison with industry statistics in setting the appropriate franchise fee.

Petitioner suggests (Pet. 10) that there is a clear statement rule concerning grants of authority to affect the profit margin of companies with which the government deals. Specifically, petitioner cites *United States* v. *Bethlehem Steel Corp.*, 315 U.S. 289, 309 (1942), for the proposition that "[t]he government may limit the profitability of companies doing business with it—but only with explicit Congressional approval." Pet. 18. That proposition, however, is not an accurate statement of the law, and *Bethlehem Steel* does not support petitioner's contention.

At issue in *Bethlehem Steel* was "a dispute * * * about the amount of profits claimed by Bethlehem under thirteen war-time contracts for building

ships." 315 U.S. at 292. The contracts granted Bethlehem a bonus if the actual cost turned out to be lower than the cost estimated at time of contracting. *Id.* at 296. The Court rejected the government's attempts to import limitations on Bethlehem's "savings" bonus not contained in the contractual provisions. In closing, the Court noted that, "[t]o meet th[e] recurrent evil [of wartime profiteering], Congress has at times taken various measures. * * * But if the Executive is in need of additional laws by which to protect the nation against war profiteering, the Constitution has given to Congress, not to this Court, the power to make them." *Id.* at 309. Here, in contrast, it is petitioner, not the government, that seeks to evade the explicit terms of its contract, and *Bethlehem Steel* is of no assistance.

b. Petitioner's contention (Pet. 20) that the CPA prohibits the unilateral adjustment of fees also is flawed. Petitioner's only argument is that Congress did not enact an earlier version of the bill that would have authorized provisions for the "reconsideration and adjustment" of fees, ultimately enacting language referring only to "reconsideration."

As the court of appeals explained, however, the original draft of the CPA stated that contracts "may" include provisions "for periodic reconsideration and adjustment of franchise fees," while the final version stated that appropriate provisions "shall" be made "for reconsideration of franchise fees." See Pet. App. 8a. Thus, "[a]n equally plausible reason for the deletion of the word 'adjustment' is that Congress chose to make reconsideration of franchise fees mandatory as opposed to permissive (and therefore substituted 'shall' for 'may'), but did not wish to require adjustment of fees every five years (therefore deleting

'adjustment'). In other words, although NPS should reconsider fees every five years, the fees need not actually be changed that often." *Id.* at 9a.

Indeed, making any change in franchise fees dependent upon the agreement of the concessioner would undermine the goal of the Act. The CPA was passed after numerous congressional committees investigated park concessions, reported that franchise fees were too low, and recommended that franchise fees be increased. See *Park Concession Hearings* 8, 32, 73. The Comptroller General also submitted a report to Congress recommending an increase in franchise fees. In addition, the Comptroller General specifically criticized the lack of a dispute resolution process during renegotiation of franchise fees, and recommended that any dispute over fees be resolved by the Secretary, whose decision should be "final and conclusive." *Id.* at 39.

Given those recommendations, NPS reasonably interpreted the CPA as allowing adjustment of fees as part of the "reconsideration" it authorizes. As the court of appeals noted, "a statutory provision calling for reconsideration of fees would be rendered meaningless if it did not include authority for the adjustment of fees as well." Pet. App. 9a.[6]

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[6] In recent hearings before Congress, the Secretary noted his concern that concessioners would not voluntarily agree to an increase in franchise fees. *Concessions Policy of the National Park Service: Hearings Before the Subcomm. on Public Lands, National Parks and Forests of the Senate Comm. on Energy and Natural Resources*, 101st Cong., 2d Sess. 43-44 (1990); see also *id.* at 157 (President of National Parks and Conservation Association was "unaware of any case where a concessioner agreed to an increase in fees when the contract had the 'mutual agreement' clause").

3. Finally, the brief for amicus National Park Hospitality Association seeks to raise an entirely new issue, arguing that NPS-48 is not merely a "guidance" document and therefore must be promulgated in accordance with the notice-and-comment procedures of the Administrative Procedure Act (APA) (see Amicus Br. 12-15). Since the NPS-48 methodology for calculating franchise fees at issue here was adopted after published notice and receipt of comments (see 51 Fed. Reg. 47,314 (1986)), and since broader issues concerning other provisions of the NPS-48 were not raised below and are not raised in the certiorari petition, the Court should not consider them.

In any event, the new argument raised by amicus is misguided. The APA notice-and-comment procedures do not apply to "a matter relating to agency management or personnel *or to public property, loans, grants, benefits, or contracts.*" 5 U.S.C. 553(a)(2) (emphasis added). Since NPS-48 contains guidelines for public concession contracts, Section 553(a)(2) plainly exempts it from the notice-and-comment requirements of the APA. NPS-48 also falls within the exception for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. 553(b)(3)(A). It merely provides guidance to NPS staff in carrying out the function called for both in the contract and in the CPA: determining a franchise fee that will accurately value the concession rights at issue and provide the concessioner with a reasonable opportunity for a profit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1996

APPENDIX A

REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES

Better Management Of National Park Concessions Can Improve Services Provided To The Public

Although the National Park Service has made some improvements in its management of concession operations in accordance with GAO's 1975 recommendations, much more needs to be done. Among other things, the Park Service needs to ensure that concession facilities are safe and sanitary and that park visitors receive quality services at reasonable prices.

GAO recommends a number of steps to improve management of concession operations in the parks.

The Congress should amend the Concessions Policy Act of 1965 to help improve the Park Service's ability to manage concessions operations.

[GAO seal]

CED-80-102
July 31, 1980

[67]

CHAPTER 7

FRANCHISE FEE RATE STRUCTURE NEEDS REVISION

The Concessions Policy Act of 1965 authorizes NPS to charge concessioners a franchise fee based on the value of the privileges granted under their contracts. In our 1975 report, we stated that we could not evaluate the basis NPS used to establish its franchise fee formula structure to determine if it was proper because essential supporting data was not available. We found that NPS did not adequately justify the rates charged and had not established criteria to help evaluate pertinent economic factors that may warrant changes in the established formula rate. Also, NPS did not have an effective contract provision to resolve disputes arising during redetermination of the franchise fee rate.

To resolve these problems, we recommend that NPS restudy the franchise fee rate structure, develop guidelines to help evaluate pertinent economic factors, and develop procedures for waiver of franchise fees. We also recommended that NPS (1) reemphasize the need to provide adequate documentation for the rates charged when they differ from the rates set by the formula and (2) revise the concession contract renegotiation provisions to provide an equitable means to settle disputes.

During our current review, we found that very little had changed since 1975 in regard to franchise fees. Our 1975 recommendations had not been imple-

mented. The franchise fee rate structure, which is based on a formula developed in 1965, does not assure that rates charged reflect the value of the privileges granted under concession contracts, and NPS spends a great deal of time determining what the rates should be. In 1978 the average franchise fee rate was less than 2 percent. Also NPS personnel who set the rates generally did not have the financial backgrounds and experience to facilitate financial analysis of concession operations. NPS plans to hire a consulting firm to develop a new system; but unless NPS personnel can properly apply the system, the rate setting will not be greatly improved.

NPS has incorporated franchise fee renegotiation procedures in its standard language contract that appear adequate. However, renegotiation will continue to be a problem under existing contracts that do not contain the new provision. It will be a number of years before many of these [68] contracts expire and the new provisions are added to the contracts.

NPS FRANCHISE FEE RATE STRUCTURE UNCHANGED SINCE 1965

The franchise fee provision of NPS concession contracts generally provides that the concessioner will pay a franchise fee based on a percentage of gross receipts as well as a charge for Government-owned facilities used by the concessioner. NPS' franchise fee rate structure is based on a formula NPS developed in 1965. The structure has not been analyzed since that time to see if it still reflects the value of privileges granted concessioners under their con-

tracts. NPS officials believe the structure needs to be changed and plan to develop a new system.

Under the formula method, NPS separates concessioners' sales into four basic types of operations and applies a specific rate to an existing concessioner's past actual sales or a new concessioner's estimated future sales for each type of operation. The four basic types of concession operations and the rates applied to gross sales in each category are (1) food, lodging, and saddle horses—3/4 percent, (2) gasoline, transportation, and photographic supplies and services—3 percent, (3) souvenir and curio sales—5 percent, and (4) all other operations, including grocery stores and snack bars—1-1/2 percent. The formula rate is then determined by dividing the total amount of franchise fees by the total amount of gross sales for the period.

The following example demonstrates how NPS arrives at a formula rate of 1.33 percent for an existing concessioner providing service in all four categories of concession operations.

[69]

Category	Average annual gross sales 1974-78 (000 omitted)	Formula rate (percent)		Amount of franchise fee
Food and lodging services	$4,000	3/4	=	$30,000
Transportation, service station	750	3	=	22,500
Souvenirs	275	5	=	13,750
All other sales	400	1-1/2	=	6,000
Total	$5,425			$72,250

Concessioner's formula rate: $72,250 ÷ $5,425,000 = 1.33 percent.

NPS could not provide data to support the rates established for each of the four basic types of operations. NPS has not analyzed these rates since 1965 to determine if they are still adequate.

NPS guidelines provide that the franchise fee rate charged a concessioner can be adjusted higher or lower if warranted by pertinent economic factors. However, as we reported in 1975, NPS had not developed criteria or guidance for its personnel to use in evaluating economic factors that may warrant increasing or decreasing the formula rate. Consequently, NPS personnel have to rely upon their own judgment in considering what impact economic factors should have on the rates and when to apply them. Factors which could affect concessioners' rates include net profit and rate of return on investment.

A financial analyst from NPS' Western Regional Office told us that because adequate guidance on "pertinent economic factors" has not been provided to NPS personnel, each region has developed its own criteria for determining appropriate franchise fee rates. He said that NPS' franchise fee formula is out of date. He stated that it was adequate when developed in 1965 but now has no relation to the value of the privileges concessioners are granted under their contracts. He believes that the formula must be updated or a new methodology created that relates franchise fees to the value of privileges granted concessioners. The Yosemite Chief of Concessions held the same opinion and said that, [70] without a realistic basis for setting rates, there will be many

disputes between NPS and concessioners over what is an adequate fee but no way to resolve them.

NPS' Chief of the Concessions Management Division agreed that the current franchise fee structure is inadequate and that a new structure needs to be developed. He said that NPS plans to hire a consulting firm in mid-1980 to develop a franchise fee system that will reflect the value of privileges granted under concession contracts. In 1978 NPS collected about $4.2 million in franchise fees from concessioners on gross receipts of about $220 million. This represented an average franchise fee rate of less than 2 percent.

NPS' draft proposal to seek a contractor to develop a viable franchise fee system, dated April 11, 1980, states that the present system is behind the state of the art and needs to be studied and compared to other franchise fee systems in the private and Federal sectors. It states that NPS does not have a system that "expresses franchise fees in a defendable manner." According to the draft proposal, by analyzing the current NPS franchise fee rate structure, franchise fee systems used by others, and other pertinent information, the consulting firm is to recommend and develop the best system for NPS.

We agree with NPS' decision to develop a new franchise system. We believe that the system developed should be easily understood by concessioners and NPS personnel who set the rates. The system should be thoroughly supported and documented and include provisions for periodic review to assure that it continues to be valid. If the new system includes adjustment of individual rates based on pertinent

economic factors, NPS should develop guidelines for its staff to use in making such adjustments.

Rate determination inadequate and time consuming under current procedures

As we have stated, NPS did not establish criteria to assist its staff in evaluating economic factors that may warrant a change in the franchise fee rate. We found that when rates were adjusted, opinions often differed over what the rate should be. Also, NPS was spending a lot of time analyzing and discussing individual franchise fee rates. In fact, as the following example shows, even the NPS Director became involved in setting a concessioner's rate.

[71] The problems of determining rates under the current structure is illustrated by a case at Yosemite involving a a concessioner that operates a photographic studio. Following is a chronology of events in this case.

—May 1974—NPS granted the concessioner a reduction in its franchise fee rate from 5 percent to 1 percent. The rate was to return to 5 percent on October 1, 1978, unless a different rate was negotiated.

—July 1978—an analysis prepared by NPS' Concessions Management Division in Washington showed that the minimum rate charged the concessioner as of October 1, 1978, should be 4.74 percent.

—September 1978—the concessioner requested the rate not be returned to 5 percent.

—October 1978—based on an analysis prepared by the Yosemite Chief of Concessions, a 3.3-percent franchise fee rate was proposed to the concessioner.

—November 13, 1978—the Director of NPS' Western Region stated that in considering the concessioner's profit, the region could see no justification for reducing the rate below 5 percent.

—November 27, 1978—the concessioner met with the NPS Director, and the Director set the franchise fee rate at 2 percent for a 2-year period, which was later changed to a 1-year period.

The meeting between the concessioner and the Director took place without the knowledge of NPS concession management officials in the field and at headquarters. The owners were accompanied at the meeting by their attorney—a former NPS Director. According to the Director, the concessioner appealed to have the franchise fee rate remain at 1 percent based on its public service program in the park and its stock of limited edition photographic prints. The prints are sold to the public and when the supply is exhausted, the concessioner's gross receipts and profit margin may be affected. The Director said that he set the fee rate at 2 percent to judge its impact on the concessioner's service and profitability. He said that it was his intention to raise the fee to 5 percent if the concessioner was not adversely affected by the increase.

However, in an August 24, 1978, memorandum, the Yosemite Park Superintendent stated that the

concessioner's "so-called [72] public services" were developed voluntarily by the concessioner and many are designed to enhance and promote concessioner sales. He said that the programs by themselves do not warrant a reduced franchise fee rate. Also, as stated above, concessions management officials at headquarters and in the field believed that the concessioner was capable of paying a higher fee.

The Chief of NPS' Concessions Management Division told us that the rate reverted to 5 percent in October 1979 and is expected to remain at that rate until the concessioner's contract expires on September 30, 1983.

We believe that this case illustrates the need for NPS to develop a franchise fee rate system that is easily understood and applied by NPS personnel who set the rates. In developing a new system, we believe that the amount of subjective analysis required in setting the rates, which results in second guessing, should be kept to a minimum. A good franchise fee rate system should eliminate the need for the numerous analyses and many discussions that occurred in the Yosemite case, as well as other cases we noted, and should assure that concessioners' rates are fair and equitable.

LACK OF STAFF WITH FINANCIAL BACKGROUND HINDERS RATE SETTING

Most NPS regional office personnel responsible for setting fee rates lacked financial backgrounds to facilitate financial analysis of concession operations. Without a financial background, staff members can have difficulty evaluating factors such as net income

or return on investment that may warrant a higher or lower franchise fee.

A September 1977 report entitled "Profitability and Operating Cost Benchmarks; Analysis of the Concessioner Annual Financial Report," prepared for NPS by a private consulting firm, identified the lack of financial experience in NPS' field offices. The report points out that of all the concessions management personnel at the nine NPS regional offices and headquarters, only four were accountants. It states that NPS personnel at the regional and park levels devote only a small amount of time to working with the financial aspects of a concession operation. According to the report, the average concession specialist spent only about 10 to 15 percent of the time working with the information from the concessioners' annual financial report. The report [73] points out that even though some qualified financial/accounting/management employees work in the regional and park concession management offices, they generally have "more pressing" activities to attend to.

Another 1977 study of concessions management operations made by NPS' Concessions Management Division reported that only one or perhaps two NPS regions made satisfactory analyses of concessioners' financial operations. The study, which covered all nine NPS regions, found that the regions' staff did not have financial backgrounds nor were they qualified to adequately review and follow through on analyses of concessioner financial reports. According to the report only the Western Region had concession specialists with accounting backgrounds.

The Chief of the Finance Branch, NPS Concessions Management Division, told us that the situa-

tion in NPS' regional and park offices has not improved since 1977. He said that very few people in concessions management have the financial background needed to evaluate the financial aspects of concessions operations. The Chief of NPS' Concessions Management Division agreed. He said that only a few concession specialists in the field have the type of background needed to effectively handle the financial and contracting aspects of concessions management.

A new system for setting franchise fee rates could provide much needed guidance and assistance to concession management personnel and help create a consistent NPS-wide approach. However, unless the system is easily understood and applied by the people responsible for setting rates, the overall improvement may be slight. NPS will need personnel with appropriate financial backgrounds and experience to administer whatever system it develops.

FRANCHISE FEE RENEGOTIATION PROVISION APPEARS ADEQUATE

In the 1975 concessions management report, we pointed out that NPS contracts generally contain a provision that the franchise fees be evaluated every 5 years. However, the contracts did not provide a means for settling disputes over adjustments in the franchise fees. If the concessioner and NPS could not agree on the amount of the new fees, neither NPS nor the concessioner could require a change in the fees.

[74] Since 1975 NPS has incorporated procedures in its standard language contract and concessions manual for renegotiating franchise fee rates after

specified periods during the term of concession contracts. These procedures appear to be adequate for settling disputes that arise during periods of renegotiation. However, renegotiation of franchise fees will continue to be a problem under existing contracts that do not contain a provision for these procedures because concessioners can refuse to allow the franchise fee fate or charge for the use of Government-owned facilities to be increased. The new procedures will not apply to these concessioners until their contracts expire and new contracts that include these procedures are negotiated. As of March 1980 only 5 of NPS' 123 existing contracts contained the renegotiation provisions. Most of these contracts will expire between 1980 and 1984; however, many will not expire until the late 1980s and 1990s.

NPS' new renegotiation provisions provide that within 60 days after the end of each 5-year period of the contract, or as otherwise specified in the contract, either the concessioner or NPS can request in writing a reconsideration of the franchise fees. If an agreement cannot be reached on the adjustment within 120 days from the date of the request, the concessioner's position must be submitted in writing within 30 days to the Secretary to determine the appropriate fees. The concessioner may request that an advisory arbitration panel be established to recommend appropriate fees to the Secretary. The panel is to include one member selected by the Secretary, one selected by the concessioner, and a third selected by mutual agreement. The Secretary's written determination is final and binding upon both parties.

Although these procedures appear adequate, concessioners operating under contracts negotiated before the procedures were established can continue to refuse increases in the franchise fees as well as fees charged for the use of Government-owned buildings. For example, at Yosemite the Yosemite Park and Curry Company has refused NPS' request to raise its franchise fee from 0.75 percent to 1.75 percent and its building use fee from $5,000 to $19,899. The concessioner told NPS that it will not negotiate new fees until the park's general management plan is approved and a determination made as to what effect, if any, the plan's implementation will have on its profitability. In 1975 YPCC also refused to renegotiate its franchise fee rate, and we reported that correspondence in NPS' files indicated its unwillingness to promptly resolve franchise fee negotiation separate and apart from other considerations. Until YPCC's contract expires on September 30, 1996, NPS will not be in [75] a position to require an increase in the franchise fee rate or building use fee.

CONCLUSIONS

NPS has made little improvement since 1975 in its method of setting franchise fee rates. It appears that the rate structure established in 1965 no longer relates to the privileges granted concessioners under their contracts. Criteria have not been developed to consider economic factors, such as an acceptable rate of return on gross sales and investment and on the relative importance of gross sale, net profit, and return on investment that may warrant a higher or lower franchise fee. Under its franchise fee structure, NPS cannot assure that the rates charged

reflect the value of the contract to the concessioners, and NPS is spending a great deal of time determining what the rates should be. Also, NPS' field staff lacked individuals with the financial backgrounds needed to facilitate franchise fee rate determination.

NPS is taking steps to hire a consulting firm to develop the best approach for NPS to set franchise fee rates. We believe that the system developed should be easily understood and properly applied by NPS personnel who set the rates. If the new system provides for adjustment of individual rates based on economic factors, NPS should develop guidelines to assist its staff in making such adjustments. Also, NPS will have to provide its field offices with individuals that have the financial training and experience needed to understand and set franchise fee rates.

NPS' procedures for renegotiating franchise fee rates after specified periods during the term of the contract appear to be adequate. However, the procedures do not apply to existing contracts established before the new procedures were effective, and concessioners with these contracts could continue to refuse to negotiate new franchise fee provisions until their contracts expire. Most of the contracts will expire during 1980-84, but many others will not expire for a number of years.

RECOMMENDATIONS TO THE SECRETARY OF THE INTERIOR

We recommend that the Secretary of the Interior require the NPS Director to:

[76]

—Develop a new franchise fee rate system that reflects the value of privileges granted under concession contracts. The new system should be easily understood with a minimum amount of subjective analysis required so that NPS concession personnel may apply it properly. The system should be thoroughly supported and documented. In the future, the system should be reviewed periodically to determine if changes are needed.

—Develop specific criteria and procedures to help concessions management staff make appropriate adjustments to franchise fee rates, if the new rate-setting system allows adjustments [*sic*] rates based on pertinent economic factors.

—Take steps necessary to supply the concessions management field staff with individuals that have the financial background and experience needed to set equitable franchise fee rates and deal effectively with the other areas of concessions contracts.

AGENCY COMMENTS AND OUR RESPONSE

NPS stated that it is in the process of contracting to update and revise its existing franchise fee system and that the contractor will be required to recommend the best system for NPS. The contractor's recommendation is to be based on a study of NPS' current franchise fee system, shopping centers, and other Government agencies. According to NPS, upon completion of the contractor's study, NPS will establish a task force to implement the final system, taking

into consideration the recommendations in both our current report and our 1975 report.

We agree with NPS' decision to develop a new franchise fee system. However, we believe the contractor should consider our recommendation that the system be easily understood and subjective analysis be kept to a minimum before completion of its study. If the contractor is not made aware of the importance of developing such a system, it may recommend a good system but one that may be difficult for NPS personnel to implement, as has happened in the past.

NPS did not address our recommendation on the need to provide its field staff with individuals that have financial backgrounds and experience. We believe that such personnel will be necessary regardless of the type of system NPS develops.

[77]

CONCESSIONER COMMENTS AND OUR RESPONSE

In commenting on the franchise fee rate determination for the photographic studio at Yosemite, the concessioner stated that the meeting it had with the Director on November 27, 1978, did not take place unknown to NPS concession management officials in the field and at headquarters. The concessioner stated that the Director indicated that he had been briefed on the matter by NPS' Chief of the Concessions Management Division prior to the meeting.

Contrary to what the Director may have told the concessioner, the Chief of NPS' Concessions Management Division informed us that the concessions

management staff in the field and at headquarters were not aware of the Director's meeting with the concessioner until after it had occurred. He said that the Director modified the agreement he had made with the concessioner, from a 2-year period to a 1-year period, after discussing the matter with the concessions management staff and realizing the agreement should not have been made.

APPENDIX B

Chapter 24 of the Concessions Guidelines (NPS-48) provides in pertinent part as follows:

FINANCIAL ADMINISTRATION

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D. FRANCHISE FEE

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5. Procedures

Concessioners pay a franchise fee to the National Park Service for the privilege of operating which, according to Public Law 89-249, "shall be determined upon consideration of the probable value to the concessioner of the privileges granted by" the authorization. This value is "the opportunity for net profit in relation to both gross receipts and capital invested." Franchise fees are secondary to both preservation of the resources and service to the visitor.

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g. FRANCHISE FEE RECONSIDERATION

Franchise fee determinations are made at various times before and during the term of the authorization. By law, they must be reconsidered at least every 5 years. The particular constraints and NPS leverage vary according to the reason and time of the consideration.

* * * * *

(2) **Reconsiderations**

Standard contract language has provisions whereby the franchise fees will be considered at periodic times during the contract. These times should be set so that there is no violation of the 5 year reconsideration requirement but it also provides the Park Service the opportunity to set reconsiderations at other appropriate times. This can be important when a new service is to be provided and there is no historical information as to the profitability. An initial fee determination can be made and then reconsidered after 2 years instead of waiting for five.

The old standard contract language requires that any decision to change a franchise fee during a reconsideration period must be mutually agreed to by both parties. That is, if either party does not agree, no change can be effected in the franchise fee.

Under the new standard contract language if both the Secretary and Concessioner cannot agree to an adjustment in franchise fees, the position of the Concessioner must be reduced to writing and submitted to the Secretary for a determination. If desired by the Concessioner, an advisory arbitration panel will be established for the purpose of recommending to the Secretary appropriate franchise fees. The written determination of the Secretary as to franchise fees shall be final and conclusive.

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